

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of March, two thousand thirteen.

PRESENT: DENNIS JACOBS,
Chief Judge,

JOSÉ A. CABRANES,
RICHARD C. WESLEY,
Circuit Judges.

- - - - -X
MICHAEL MARCAVAGE and MICHAEL
STOCKWELL,
Plaintiffs-Appellants,

-v.-

12-2638-cv

SYRACUSE POLICE DEPARTMENT, FRANK
FOWLER, Chief of Police, in his
official and individual capacities,
JOSEPH CECILE, Deputy Chief of Police,
in his official and individual
capacities, RICHARD SHOFF, Lieutenant,
in his official and individual
capacities, MICHAEL LONG, Sergeant, in
his official and individual

1 capacities, PAUL KLUGE, Officer, in
2 his official and individual
3 capacities, JOHN DOE, Unidentified
4 Officer of the Syracuse Police
5 Department, in his official and
6 individual capacities, JAMES DOE,
7 Unidentified Officer of the Syracuse
8 Police Department, in his official and
9 individual capacities, CITY OF
10 SYRACUSE, NEW YORK,
11 Defendants-Appellees.¹

12 - - - - -X

13
14 **FOR APPELLANTS:** JAMES P. TRAINOR, Cutler,
15 Trainor & Cutler LLP, Malta, NY.

16
17 **FOR APPELLEES:** JOSEPH R. H. DOYLE, Assistant
18 Corporation Counsel for Mary
19 Anne Doherty, Corporation
20 Counsel, Syracuse, NY.

21
22 Appeal from a judgment of the United States District
23 Court for the Northern District of New York (Kahn, J.).

24
25 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
26 **AND DECREED** that the judgment of the district court be
27 **AFFIRMED.**

28
29 Michael Marcavage and Michael Stockwell appeal from the
30 denial of their motion for a preliminary injunction barring
31 the enforcement of a Syracuse noise ordinance (the
32 "Ordinance"), issued by the United States District Court for
33 the Northern District of New York (Kahn, J.). We assume the
34 parties' familiarity with the underlying facts, the
35 procedural history, and the issues presented for review.

36
37 In order to obtain a preliminary injunction, "a moving
38 party must demonstrate that (1) he is likely to succeed on
39 the merits of the underlying claim, (2) he will suffer
40 irreparable harm absent injunctive relief, and (3) the
41 public interest weighs in favor of granting the injunction."

¹ The Clerk of Court is directed to amend the caption of this case to conform to the listing of the parties shown above.

1 Pope v. County of Albany, 687 F.3d 565, 570 (2d Cir. 2012).
2 "We review the denial of a preliminary injunction motion
3 deferentially for abuse of discretion, which we will
4 identify only when the district court decision rests on an
5 error of law or a clearly erroneous finding of fact." Id.
6 at 570-71.
7

8 "[T]he right to use public forums such as streets for
9 speech and assembly is not absolute." United for Peace &
10 Justice v. City of New York, 323 F.3d 175, 176 (2d Cir.
11 2003) (per curiam). Public speech "is subject to reasonable
12 time, place, or manner restrictions," which are "valid
13 provided that they are justified without reference to the
14 content of the regulated speech, that they are narrowly
15 tailored to serve a significant governmental interest, and
16 that they leave open ample alternative channels for
17 communication of the information." Clark v. Cmty. for
18 Creative Non-Violence, 468 U.S. 288, 293 (1984). The
19 district court did not abuse its discretion in holding that
20 Marcavage and Stockwell failed to prove likely success on
21 their claim that the noise ordinance was unconstitutional,
22 either on its face or as applied.
23

24 Marcavage and Stockwell argue that the Ordinance is
25 unconstitutional on its face because of overbreadth and
26 vagueness. However, facial challenges are disfavored, and
27 the Ordinance must be upheld so long as it has a "'plainly
28 legitimate sweep.'" Washington State Grange v. Washington
29 State Republican Party, 552 U.S. 442, 449-51 (2008) (quoting
30 Washington v. Glucksberg, 521 U.S. 702, 739-740 (1997)
31 (Stevens, J., concurring)). We have upheld the
32 constitutionality of similar noise ordinances that turn on a
33 reasonable person's perception of unnecessary noise in the
34 past. See, e.g., Howard Opera House Assocs. v. Urban
35 Outfitters, Inc., 322 F.3d 125, 128 (2d Cir. 2003)
36 (Burlington ordinance prohibiting "loud or unreasonable
37 noise" is not vague and "passes constitutional muster").
38 There is no ground for treating this Ordinance differently,
39 especially in response to a facial challenge.
40

41 Marcavage and Stockwell assert that a preliminary
42 injunction is necessary because of the manner in which the
43 Ordinance is (and was) applied. However, the only apparent
44 problem in the application of the Ordinance stemmed from a
45 single officer who made statements that were inconsistent
46 with the plain text of the Ordinance, and who was
47 consequently relieved from his role in enforcing the

1 Ordinance. Therefore, this is not a case like Elrod v.
2 Burns, 427 U.S. 347, 373-74 (1976), where there was a
3 "threatened and occurring" loss of First Amendment freedoms.
4 There is here no realistic threat of a "present and ongoing
5 injury." Buckingham Corp. v. Karp, 762 F.2d 257, 262 (2d
6 Cir. 1985). The district court did not abuse its discretion
7 in finding that Syracuse is not "continuing to tread on
8 Plaintiffs' constitutional rights in [its] current
9 application of the Ordinance[]." Marcavage v. Syracuse
10 Police Dep't, No. 5:12-CV-00761 (LEK/DEP), at *11 (N.D.N.Y.
11 June 6, 2012). Preliminary injunctive relief is therefore
12 inappropriate.

13
14 For the foregoing reasons, and finding no merit in
15 Marcavage and Stockwell's other arguments, we hereby **AFFIRM**
16 the judgment of the district court.

17
18 FOR THE COURT:
19 CATHERINE O'HAGAN WOLFE, CLERK
20